Supreme Court, U.S.
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No. 10-925

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

REPLY BRIEF

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REPLY BRIEF

Petitioner Grand Trunk Western Railroad Company ("GTW" or "Petitioner") submits this Reply in support of its petition for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

In the Petition ("Pet."), GTW showed that the decision below presents the same issue of the proper standard for causation under the Federal Employers' Liability Act ("FELA") currently before the Court in *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010) (argued Mar. 28, 2011). Pet. 2-3, 14, 15-17. Petitioner thus requested that the petition be held pending this Court's resolution of *McBride*. Pet. i, 14. Second, GTW showed that the petition also should be granted because the imposition of liability in this case under FELA and the Locomotive Inspection Act ("LIA") was inconsistent with this Court's decisions highlighting the deference properly accorded to a federal agency's interpretation of its own regulations, and that the failure to accord deference imposes a virtually impossible standard for railroads to defend. *Id.* at 17-20. The Opposition ("Opp.") does not undermine these conclusions.

On the first issue, Respondent argues that "the petition should not be held pending *McBride* and instead should be denied" because Petitioner "did not preserve the claim that proximate causation is an element of a FELA claim." Opp. 11. That is wrong. Petitioner expressly challenged the causation instruction given to the jury and requested that the jury be instructed pursuant to the specific language of FELA. Trial Transcript ("Tr.") 1260-61. Petitioner renewed that challenge in the court of appeals because the instruction given by the trial court

misstated the proper standard for causation under FELA. Petitioner argued:

> The common law proximate cause standard dictates that the jury be instructed to determine whether the railroad's negligence caused the plaintiff's injury in whole or in part, i.e., that it was a proximate cause of the injury. An instruction which relaxes this standard with words such as "however slight," "no matter how slight" or "even the slightest" is patently wrong and flies in the face of United States Supreme Court and federal precedent.

Pet. Appellate Br. 24, App. No. 92711; *id.* at 23-24 (citing cases). Respondent made no claim that any aspect of this argument had been forfeited. The Ohio court of appeals, relying upon this Court's decision in *Rogers*, rejected Petitioner's claim on the merits. Pet. App. 16a-17a. There has been no forfeiture. This case properly presents the same question as *McBride*: What is the standard for causation under FELA. This case should be held for *McBride*.

As to the second issue, Respondent argues both that the issue is not presented and is not worthy of this Court's consideration because, among other things, this Court reaffirmed the "standard for judicial deference to an agency's interpretation of its own regulation . . . less than three months ago." Opp. 3 (citing *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871 (2011)). Respondent's arguments should be rejected. Below, petitioner presented detailed evidence of the Federal Railway Administration's (FRA) interpretation of Section 229.43 and argued to the Ohio Court of Appeals that, under that agency interpretation, Respondent could not base liability on evidence that exhaust fumes had entered into the cab to support a claim under 49 C.F.R. § 229.43. The

court of appeals never addressed the FRA's interpretation, and its refusal to do so is contrary to this Court's cases explaining that deference is warranted under these circumstances. That conflict, in turn, implicates an issue of critical importance to the railroad industry as explained in the amicus brief submitted by the Association of American Railroads. Depending on how the Court decides *McBride*, it either should vacate and remand the judgment in this case or grant the petition and decide both questions on the merits.

I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* V. *MCBRIDE*, NO. 10-235.

Respondent argues that Petitioner "should not be permitted to seek any benefit from this Court's decision in *McBride*" because he contends that petitioner did not "preserve in the Ohio courts the argument that 'proximate cause' is an element of a FELA claim." Opp. 2. Respondent is simply wrong.

First, Petitioner objected to the trial court's proposed causation instruction because it did not accurately set forth the appropriate substantive standard for causation under FELA. Tr. 1260-61 (requesting that the jury be "charged in the language of the statute"). Thereafter, relying upon the decision in *Sorrell*, Petitioner objected to the "in the slightest" language "enunciated in the *Rogers* case" and requested that the jury be instructed in accord with the language of FELA on the issue of causation. Tr. 1260-61, 1282-84 (citing *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957)). The trial court overruled that objection.[1]

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[1] As respondent acknowledges, Opp. 7 n.5, Petitioner proposed an instruction that required the jury to determine whether its

In its post-trial motion, Petitioner argued that the trial court had not followed *Sorrell* and the "traditional common law notions of proximate cause," and instead "improperly quantified the degree of causation under" FELA by "us[ing] the phrase 'however slight' or 'in the slightest' in the jury charge." Deft Grand Trunk W. R.R. Inc.'s Mot. for Judgment Notwithstanding the Verdict or New Trial at 13-15, No. 558055 (Ohio Ct. of Common Pleas filed Nov. 21, 2008). Respondent opposed Petitioner's argument, but never suggested that this argument had been forfeited or waived.

On appeal, Petitioner again relied on *Sorrell*, again showed that *Rogers* was not controlling, and again made clear that the proper standard under FELA was proximate causation. *See* Pet. Appellate Br. 20-25 (14 references to proximate causation); Pet. Appellate Reply Br. 4-6 (11 references to proximate causation). Specifically, as noted above, Petitioner argued that the trial court's inclusion of "words such as 'however slight,' 'no matter how slight' or 'even the slightest' is patently wrong and flies in the face of United States Supreme Court and federal precedent" because it "relaxes" the "common law proximate cause standard." Pet. Appellate Br. 24. Petitioner further argued that "[s]ince the inception of the FELA, a plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's injury. There is no relaxed causation standard or the 'in the slightest' standard as urged by [Respondent] and erroneously adopted by the trial court." *Id.* at 23.

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conduct was a "proximate cause" of respondent's injuries and objected to the instruction given.

Respondent acknowledges, in a footnote, Opp. 10 n.6, that Petitioner made these arguments in the court of appeals. In the court of appeals, Respondent raised no claim of forfeiture or waiver. Instead, Respondent argued solely on the merits that "[t]he correct standard of causation was given in the instant matter and the trial court properly charged the jury." Resp. Appellate Br. 27. Relying on Justice Ginsburg's concurring opinion in *Sorrell*, respondent argued that "'the causation standard in FELA actions is more "relaxed" than in tort litigation generally.'" *Id.* Indeed, the principal case on which Respondent relied equated the rejection of proximate causation under FELA with *Rogers*' adoption of the "even the slightest" language. *See id.* (quoting *Blankenship* v. *CSX Transp., Inc.*, 1993 Ohio App. LEXIS 3521, at *11-12 (Ohio Ct. App. July 15, 1993)). The Ohio court of appeals addressed these arguments on the merits and ruled that the trial court's causation instruction was appropriate under this Court's decision in *Rogers*. Pet. App. 17a. There was no forfeiture in this case.

To the contrary, just as in this case, the petitioner in *McBride* objected to the analogous "no matter how small" formulation used in its causation instruction. *See* Brief for Petitioner at 7-10, *CSX Transp., Inc.* v. *McBride*, No. 10-235 (U.S. filed Jan. 13, 2011) (citing *Rogers*). And, as was the case here, petitioner in *McBride* challenged the *Rogers* formulation because it unduly relaxes the standard for causation under FELA. The question whether Congress preserved common-law proximate causation, as indicated by three Justices in *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 172-74 (2007) (Souter, J., concurring), or adopted a more relaxed causation standard, as held by the Seventh Circuit, *McBride* v. *CSX Transp., Inc.*, 598

F.3d 388 (7th Cir. 2010), is the question presented to this Court in *McBride*. There is every indication that this Court's decision in *McBride* will be an "'intervening factor . . . that has a legal bearing upon the decision'" of the Ohio court of appeals. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996) (per curiam) (internal quotation marks omitted). This case should be held pending resolution of *McBride* and then be disposed of consistent with this Court's holding.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES REGARDING THE DEFERENCE OWED TO AN AGENCY'S INTERPRETATION OF ITS REGULATION.

Respondent advances a scatter-shot series of arguments opposing review of the second question presented. He contends that the issue of deference to an agency's interpretation was not "pressed or passed on below," Opp. 13, and that petitioner "identifies no *agency* interpretation to which deference could be given," *id.* at 14. He further contends that review is unwarranted because there is "no conflict among the federal courts of appeals or state supreme courts" *id.* at 14-15, and that resolution of this "issue in petitioner's favor would not affect the outcome of the case," *id.* at 15. Lastly, he argues that the FRA's interpretation is contrary to the language of the regulation. *Id.* at 16. These arguments do not withstand scrutiny.

First, the issue of deference to an agency's interpretation of its regulations was presented to the court of appeals. Petitioner expressly argued in the court of appeals that there was no violation of the LIA because the FRA has interpreted 49 C.F.R. § 229.43 to require (i) "evidence of a specific break or defect in the exhaust system," or (ii) evidence that

"the diesel exhaust entering the cab of a locomotive exceeds permissible standards set forth by OSHA." Pet. Appellate Br. 17. Based on that interpretation, petitioner argued to the court of appeals that "it is not a violation of [Section] 229.43 where the engine in service has no defect in the exhaust system and the engine stacks are the proper height but some diesel exhaust still enters the cab during normal operating procedures." *Id.* Petitioner argued that, measured by this legal interpretation, Respondent had failed to prove a violation of Section 229.43.

The court of appeals disregarded FRA's interpretation of Section 229.43, and instead held, based on the court's holding in a prior case, that Section 229.43 "'prohibits diesel exhaust from coming into the cab of the locomotive.'" Pet. App. 12a. Specifically, the court of appeals ruled that respondent had proven an LIA violation because "'the cab would get diesel exhaust in.'" *Id.* (citing *Hager* v. *Norfolk W. Ry.*, Cuyahoga App. No. 87553, 2006-Ohio-6580). The decision below adopts a legal interpretation that is contrary to that of the FRA. In turn, the approach adopted by the court of appeals is contrary to this Court's controlling precedent under which "the administrative interpretation" must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The decision below conflicts with this Court's precedent requiring courts to defer to administrative interpretations of regulations that are not inconsistent with the language of the regulation.

Second, deference to an agency interpretation is warranted in a wide variety of circumstances so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and

considered judgment on the matter in question." See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation set forth in a "legal brief"); see *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988) (same); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to "Advisory Memorandum" issued only to internal agency personnel). The court of appeals did not suggest that the testimony of Mr. English, the former Director of the FRA's Office of Safety Assurance and Compliance, did not accurately reflect the FRA's interpretation of what is required to establish a violation of Section 229.43. Nor could it, as Mr. English's testimony simply set forth the same standards embodied in FRA's official publications. AAR Amicus Br. 6-7 (the FRA's interpretation of Section 229.43 as reflected in FRA "Crashworthiness Report"). The court of appeals ignored this testimony reflecting FRA's interpretation of its own regulation. Instead, the court adopted its own independent view of the requirements of Section 229.43.

Third, the issue presented plainly is one of recurring national importance. As petitioner has shown previously, Pet. 17-18, the decision below conflicts with this Court's standards governing the deference due to an agency's interpretation of its regulations. Further, the proper interpretation of this regulation is of critical importance because the court's failure to defer to the FRA's interpretation of Section 229.43 will "have profound implications for the rail industry's fleet of over 24,000 locomotives." AAR Amicus Br. 9. Indeed, the court's independent interpretation of this regulation "without evidence of defective equipment or levels of exhaust exceeding OSHA threshold limits, potentially renders every

locomotive used by railroads in violation of federal law." *Id.*

Fourth, resolution of this issue would have a bearing on the judgment in this case. Respondent points to evidence in the record that "'under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred.'" Opp. 15 (alterations in original) (quoting Pet. App. 13a). At trial, respondent testified that the "circumstances" noted above – exhaust coming up through the floorboards – occurred only on locomotives with which he worked *after* he already had been diagnosed with COPD. Pet. 9 n.4. That is the condition to which the overwhelming majority of his damages were attributable. *Id.* at 11. As a result, the proper interpretation of Section 229.43 would make a significant difference in this case.

Finally, respondent's merits-based argument provides no warrant for denying review. Respondent argues that Section 229.43 "contains no language indicating that there must be a specific defect in the exhaust system or that the amount of exhaust fumes in the cab must exceed some threshold set by OSHA." Opp. 16. The controlling standard under this Court's cases is that deference is appropriate "unless" the interpretation "is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Here, FRA's interpretation of Section 229.43 is entirely consistent with the language of the regulation, and FRA's decision to limit liability to circumstances where, for example, diesel exhaust exceeds the levels considered hazardous by OSHA, is entirely appropriate.

The critical point, however, is that the court of appeals did not engage in that analysis or apply this Court's precedent governing the deference due to an

agency's interpretation. Instead, it adopted its own view of Section 229.43 even though that interpretation has profound implications for the fleet of diesel locomotives used across the country by the railroad industry. The petition should be granted because the decision below conflicts with this Court's decisions on a recurring matter of national importance.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be held pending resolution of *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010), and then resolved in accord with the Court's decision in that case. Depending on the Court's decision in *McBride*, it either should vacate the judgment and remand the case or alternatively, grant the petition and hear the case on the merits.

Respectfully submitted,

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